

**Initial Public Participation Working Group Draft
of the
Constitutional Nexus Guideline for Application of
a State's Sales and Use Tax to an Out-of-State Business
(D*R*A*F*T—03/97)**

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I. *Preliminary Comments.*

A. *Differentiating a sales tax, a use tax, and a use tax collection duty.* A state sales or use tax can potentially arise in three different contexts with respect to an **out-of-state business**: (i) the application of a sales tax; (ii) the application of a use tax; and (iii) the imposition of a use tax collection duty with respect to a third-party's obligation to pay the use tax to the taxing State.

B. *Form of sales and use taxes.* There are three types of sales and use taxes: a vendee form, a vendor form and a combined form. A vendee sales tax is a sales tax that places the legal incidence of the tax on the purchaser, even though the seller may be required to collect and remit the tax from collections made from the purchaser. A tax that places the legal incidence of the sales tax on the seller but also requires the seller to collect the tax from the purchaser is also a vendee sales tax. A vendor sales tax is a sales tax that places the legal incidence of the tax on the seller, even though the seller may have the option to collect the tax from the purchaser. A combined sales tax is a sales tax that displays aspects of both a vendee form and a vendor form.

C. *Nexus.* One necessary condition to the application of a state sales tax or a state use tax, or the imposition of a use tax collection duty, is the satisfaction of the U.S. constitutional requirement of nexus. Nexus means there is sufficient connection with the taxing State for that State to apply its sales or use tax or to impose a use tax collection duty.

D. *Limitation of application of Guideline.* This Guideline describes when, under the U.S. Constitution, sales and use tax nexus with respect to an **out-of-state business** is present. Nexus must be present in each of three possible circumstances for which a state sales and use tax may apply: the application of a state sales tax, the application of a state use tax, and the imposition of a use tax collection duty. The Guideline does not extend beyond sales and use taxes. In using the Guideline to determine the presence of nexus under the U.S. Constitution, users, in addition to determining the presence of nexus with respect to an **out-of-state business**, must also determine in the first instance whether, based upon applicable state law, the taxing State's sales and use tax applies at all and if so, how. This Guideline does not address these state law considerations. Determination of state statutory nexus is the province of the state legislatures.

II. *Due Process Clause and Commerce Clause define nexus.* The Due Process Clause and the Commerce Clause of the U.S. Constitution define U.S. constitutional nexus. Before a taxing State may apply a sales tax or a use tax, or impose a use tax collection duty, the application or imposition must satisfy the nexus requirements of both Clauses.

A. *Due Process Clause Nexus.* “Minimum contacts nexus” is the term that describes the Due Process Clause component of nexus. A determination of minimum contacts nexus is made by reference to the quality and quantity of contacts with the taxing State. Minimum contacts nexus involves notions of fairness and substantial justice in the application of the sales tax or use tax, or the imposition of a use tax collection duty.

1. Under minimum contacts nexus, a sales tax (whether in vendee, vendor, or combined form) may be applied to a taxable **sale** concluded by an **out-of-state business**, when the taxable **sale** occurs in the taxing State.
2. Under minimum contacts nexus, a use tax (whether the sales tax for which the use tax compensates is a vendee, vendor, or combined form) may be applied to a taxable **use** of the **out-of-state business**, when the taxable **use** occurs in the taxing State.
3. Under minimum contacts nexus, a use tax collection duty may be imposed on an **out-of-state business**, when
 - a. The **out-of-state business** is present in the taxing State, *provided*, the **out-of-state business** has not established that its presence is *de minimis*; or
 - b. The **out-of-state business purposefully** avails itself of the benefits of an economic market in the taxing State, either on its own or through a **representative**, and the magnitude of the contacts satisfies notions of fairness and substantial justice in imposing a use tax collection duty, *provided*, the use tax collected pertains to the business occurring in economic market of the taxing State; or
 - c. The **out-of-state business** engages, either on its own or through a **representative**, in **regular** and **systematic solicitation** of business in the taxing State and the magnitude of the contacts satisfies notions of fairness and substantial justice in imposing a use tax collection duty.

B. *Commerce Clause Nexus.* “Substantial nexus” is the term that describes the Commerce Clause component of nexus. Substantial nexus protects interstate and foreign commerce from unreasonable burdens that would impair the free flow of that commerce.

1. Under substantial nexus, a sales tax (whether in vendee, vendor, or combined form) may be applied to a taxable **sale** concluded by an **out-of-state business**, when the taxable **sale** occurs in the taxing State.
2. Under substantial nexus, a use tax (whether the sales tax for which the use

tax compensates is a vendee, vendor, or combined form) may be applied to a taxable **use** of the **out-of-state business**, when the taxable **use** occurs in the taxing State.

3. Under substantial nexus, a use tax collection duty may be imposed on an **out-of-state business**, when

- a. The **out-of-state business** is physically present in the taxing State, *provided*, the **out-of-state business** has not established that its presence is *de minimis*; or
- b. The **out-of-state business** lacks a physical presence in the taxing State but the business' connection with the taxing State is not limited to contact with its customers by **common carrier** or the U.S. mail and the imposition of a use tax collection duty does not unreasonably burden interstate or foreign commerce.

- C. *Concept of physical presence in taxing State.* An **out-of-state business** is physically present in the taxing State within the meaning of II.A.3.a. and II.B.3.a., when the business engages in one or more of the following activities:

1. maintains (a) the **permanent** presence of one more employees; or (b) the temporary presence of one or more employees where the temporary presence is significantly associated with the **out-of-state business**' ability to establish and maintain the market in the taxing State with respect to the sale for which the possible use tax collection duty may be imposed.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A stations in State 1 for an indefinite duration that is likely to exceed one year in length an on-site "print engineer," an employee of Corporation A, to oversee quality control at the printer of corporation A's national catalogs. Corporation A has a presence in State 1. The indefinite presence of one or more employees in State 1 is **permanent** and constitutes physical presence, even if the stationed employee is not directly associated with the establishment and maintenance of a market in State 1.

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A decides that it will for a period likely to exceed one year indefinitely maintain through rotation of its employees at least one employee in State 1 to foster positive relationships with its important suppliers. The identity of the specific employee in State 1 changes from time in accordance with the rotation system. The **out-of-state business** maintains a **permanent** presence of one or more of its employees in State 1 and has a physical presence in State 1.

Example 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A assigns State 1 as a part of the sales territory to be covered by a salesperson who lives and **maintains** his/her office outside State 1. The salesperson travels to State 1 on an **occasional** basis, depending upon market conditions. Corporation A has a presence in State 1. The **occasional** presence in State 1 of a salesperson with an assigned territory in that State is significantly associated with the ability of the Corporations A's ability to establish and maintain a market in State 1 with respect to the sale for which the possible use tax collection duty may be imposed. This presence though limited in time constitutes physical presence.

Example 4: Corporation A is an **out-of-state business** with respect to State 1. Corporation A temporarily sends different employees into State 1 to assist its independent legal counsel in that State to defend a lawsuit. The presence of the employees in State 1 is not **permanent**. Additionally, the presence of the employees is not significantly associated with the ability of Corporation A to establish and maintain a market in State 1 with respect to the sale for which the possible use tax collection duty may be imposed. Corporation A has no physical presence in State 1 by virtue of the temporary presence of its employees in that State to assist in the defense of a suit.

Example 5: Corporation A is an **out-of-state business** with respect to State 1. One of Corporation A's employees lives in State 1. The employee's presence in State 1 is not associated with the activities of Corporation A and Corporation A has no presence in State 1 by virtue of the residence of its employee.

Example 6: Corporation A is an **out-of-state business** with respect to State 1. Corporation A permits on an indefinite basis that is likely to exceed one year one of its employees who lives in State 1 to telecommute from his/her residence in State 1. The **out-of-state business** maintains a **permanent** presence of one or more of its employees in State 1 and has a physical presence in State 1.

2. owns, **leases**, or **maintains** real property located in the taxing State, including, without limiting the foregoing, an office or other facility; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A owns investment real estate in State 1 that is not related to its business of making catalog sales to persons in State 1. Corporation A has a physical presence in State 1. Ownership of real estate in State 1, even if unrelated to the business conducted with respect to State 1, constitutes the holding of property in State 1. The principle of dissociation of *Norton Co. v. Dept. of Revenue of Illinois*, 340 U.S. 534 (1951), is inapplicable to all forms of sales and use taxes.

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A owns, **leases**, licenses or uses billboards, showrooms, advertising kiosks, sample and display rooms, or other similar property devoted to advertising, **solicitation**, or other marketing purposes. Corporation A **maintains** real property in State 1. Corporation A has a physical presence in State 1.

Example 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A **maintains** an office in State 1. The activities of the office are not related to the catalog sales Corporation A makes to persons in State 1. The office constitutes physical presence, even if the office's activities do not relate to the sales being made by the Corporation A to persons in State 1.

3. owns, **leases**, or **maintains** tangible personal property located in the taxing State; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A in accordance with its normal business practice consigns tangible personal property to unrelated persons in State 1 who thereafter sell or **lease** or license the consigned property. The owner of property consigned to another holds property in the State where the property is consigned. Corporation A has a physical presence in State 1.

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A makes catalog sales of tangible personal property to **in-state persons** of State 1 and in accordance with its normal business practice secures from time to time a security interest in merchandise sold on installment to **in-state persons** in State 1. An **out-of-state business** holding a security interest in tangible personal property holds an interest in the property. Corporation A has a physical presence in State 1.

Example 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A, in accordance with its normal business practice, orders and stores (following its supplier's shipment) paper stock at the printer of its catalogs which is located in State 1. Paper stock quantities in significant amounts are held at the printer for one month periods four times each year to support the four-season printing of its national catalog. Corporation A has physical presence in State 1.

Example 4: Corporation A is an **out-of-state business** with respect to State 1. Corporation A as an experiment to increase market share hires for one sport's season an airplane to navigate around an outside baseball stadium in State 1 to advertise its product to fans attending games in the arena. Corporation A **maintains** tangible personal property in State 1 temporarily. Corporation A has physical presence in State 1.

Example 5: Corporation A is an **out-of-state business** with respect to State 1. Corporation A stores some its business records with its auditors who are located in State 1. Corporation A has physical presence in State 1 by virtue of the storage of some of its accounting records in State 1.

Example 6: Corporation A is an **out-of-state business** with respect to State 1. Corporation A in accordance with its normal business practice stores finished product at a supplier in State 1 that fabricated the product for Corporation A until such time as it has a sufficient quantity for the product to be economically shipped in bulk to a point outside the State. The storage of finished product at the fabricator of that product until it can be economically shipped in bulk outside the State constitutes physical presence.

- 196 4. [Reserved.] (This paragraph is reserved for a possible discussion of
197 physical presence based upon an out-of-state business relationship to
198 intangible property located in the taxing state.)
- 199 5. retains a **representative** or **representatives** who solicit or conduct business
200 or perform services on behalf of the **out-of-state business** in the taxing
201 State and this activity is significantly associated with the ability of the **out-**
202 **of-state business** to establish and maintain a market in the taxing State with
203 respect to the sale for which the possible use tax collection duty may be
204 imposed; or

205 *Example 1:* Corporation A is an **out-of-state business** with respect to State 1.
206 Corporation A makes catalog sales of tangible personal property to persons in State
207 1. Corporation A hires an independent contractor who is not an **in-state person** to
208 provide customer complaint and warranty services to the **out-of-state business'**
209 customers in State 1. The independent contractor makes visits in State 1 to resolve
210 customer complaints and to perform warranty service on the product sold by
211 Corporation A. Corporation A has a presence in State 1. The contractor visits are
212 significantly associated with the ability of the Corporation A to establish and
213 maintain a market in the taxing State with respect to the sale for which the possible
214 use tax collection duty may be imposed.

215 *Example 2:* Corporation A is an **out-of-state business** with respect to State 1.
216 Corporation A makes catalog sales of tangible personal property to **in-state persons**
217 of State 1 and makes in-state deliveries of merchandise sold or its catalogs to **in-**
218 **state persons** by a **contract carrier** and not a **common carrier** acting in its
219 **common carrier** status. Corporation A secures benefits beyond mere delivery at a
220 reduced price from dealing with its shipper on a private contract basis. Corporation A
221 has a presence in State 1. The **contract carrier** is a **representative** of the **out-of-**
222 **state business**. The deliveries do not fall within the limited safe harbor of contact
223 with customers being limited to **common carrier** and U.S. mail. *See National Bellas*
224 *Hess, Inc. v. Dept. of Revenue of Illinois*, 386 U.S. 754 (1967), and *Quill Corp. v.*
225 *North Dakota*, 112 S.Ct. 1904 (1992).

- 226 6. retains a **representative** or **representatives** who are not described in
227 paragraph 4 but who own, **lease**, use or **maintain** an office or other
228 establishment in the taxing State, and this property is used in the
229 representation of the **out-of-state business** in the taxing State and is
230 significantly associated with the ability of the **out-of-state business** to
231 establish and maintain a market in the taxing State with respect to the
232 sale for which the possible use tax collection duty may be imposed; or

233 *Example 1:* Corporation A is an **out-of-state business** with respect to State 1.
234 Corporation A is a reseller of interexchange telecommunications services and sells
235 prepaid phone cards as one method for providing this service. In order to initiate the
236 interexchange telecommunications originating from State 1, the holder of the prepaid
237 phone card must use the local exchange and the facilities-based interexchange carrier,
238 both of which have property in State 1 that actually permit the call to go through. By
239 virtue of arrangements that exist for interconnectivity, the property

of the local exchange carrier and the interexchange carrier that facilitates the completion of the call is significantly associated with the ability of Corporation A to establish and maintain a market in State 1 with respect to the sale for which the possible use tax collection duty may be imposed. Corporation A by virtue of its use of the property of its **representatives** in State 1 has physical presence in State 1.

Example 2: [Reserved.] (This example and possibly others are reserved for a possible illustration of physical presence based upon the ownership, lease, use or maintenance of an establishment in the taxing State that facilitates the conduct of a business through computer-based telecommunications.

7. [Reserved.] (This paragraph is reserved for a possible discussion of physical presence based upon a representative of an out-of-state business having a relationship to intangible property located in the taxing state).
8. either on its own or through a **representative** or **representatives**, **maintains** in the taxing State by private contract, and not by purchase from a **common carrier** in the **common carrier's** status as a **common carrier**, telecommunication linkage that is significantly associated with the ability of the **out-of-state business** to establish and maintain a market in the taxing State with respect to the sale for which the possible use tax collection duty may be imposed; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A **maintains** local telecommunications access in State 1 by virtue of an agreement with an interexchange carrier not acting in its capacity as a **common carrier** when dealing with the Corporation A. The carrier by contract with the telecommunications company serving the local exchanges in State 1 arranges for transparent switching that achieves Corporation A's objective of appearing as a business with which the customers in State 1 can access as easily as if the business were located "down the street" in State 1, including the making of a local telephone call. Corporation A has presence in State 1. The interexchange carrier acts on behalf of the **out-of-state business** by providing local access and this representation in State 1 is significantly associated with the ability of the **out-of-state business** to establish and maintain a market in the taxing State with respect to the sale for which the possible use tax collection duty may be imposed. (Note there may be many other justifications under this example for treating the **out-of-state business** as having a presence in State 1.)

9. either on its own or through a **representative** or **representatives**, performs or renders services in the taxing State.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A is a reseller of interexchange telecommunications services. A facilities-based, interexchange telecommunications service provider actually supplies the telecommunications services being resold under bulk purchase contract with the reseller. Corporation A has presence in State 1. The facilities-based, interexchange telecommunications service provider is providing a service in State 1 on behalf of Corporation A, because the services are not completely performed until the telecommunications services are delivered in State 1.

Example 2: [Reserved.] (This example and possibly others are reserved for possible illustration of physical presence based upon the delivery of services into the taxing State through computer-based telecommunications.)

D. *Concept of de minimis and application of de minimis concept.*

1. *Concept of de minimis.* An **out-of-state business**' presence in the taxing State is *de minimis* when that presence is trivial. The presence of an **out-of-state business** in the taxing State is not trivial, and thereby exceeds *de minimis*, when
 - a. *More than slightest presence.* The presence of the **out-of-state business** exceeds a **slightest presence** and enables the **out-of-state business** to enjoy the benefits, privileges and services of an organized society provided by the taxing State; or
 - b. *Conscious submission to jurisdiction.* The presence is not inadvertent, but represents a conscious choice of the **out-of-state business** to submit to the jurisdiction of the taxing State, as for example where the presence arises from a **regular** and **systematic** business practice, the pursuit of an established company policy on a continuing basis, an affirmative decision of management, or a step taken to assist in the establishment and maintenance of a market in the taxing State with respect to the sale for which the imposition of a use tax collection obligation may be imposed.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that a customer in violation of its affirmative covenants to the business moved the property sold by installment and in which the business has a perfected security interest from an authorized locality in another State to State 1. The presence of Corporation A in State 1 is *de minimis*. The presence is not more than a "**slightest presence**" and did not in any event arise from a conscious submission to the jurisdiction of State 1.

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that it has a policy of installment selling to **in-state-persons** and from whom it in accordance with its normal business practice secures a perfected security interest in the property sold that after the sale is located in State 1. The presence of Corporation A in State 1 is not *de minimis*. The presence derived from Corporation A's security interest in property located in State 1 arises from a conscious choice to submit to the jurisdiction of State 1 because the security interests were secured as a part of its normal business practice that reflects either a **regular** and **systematic** business practice, an established company policy pursued continuously, an affirmative decision of management or a step taken to assist in the establishment and maintenance of a market in State 1 with respect to the sale for which the imposition of a use tax collection obligation may be imposed.

325 *Example 3:* Corporation A is an **out-of-state business** with respect to State 1.
326 Corporation A has a presence in State 1 derived solely from the fact that an
327 employee on his/her own initiative, and without the territory being assigned to
328 him/her, entered State 1 and made a single **sale**. Corporation A allowed the **sale** to
329 go through on a one-time basis to avoid embarrassment. The presence of Corporation
330 A in State 1 is *de minimis*. The presence is not more than a “slightest presence,” was
331 inadvertent, and did not in any event arise from a conscious submission to the
332 jurisdiction of State 1.

333 *Example 4:* Corporation A is an **out-of-state business** with respect to State 1.
334 Corporation A has a presence in State 1 derived solely from the fact that an
335 independent contractor representing the business enters State 1 on an average of two
336 days per year to make **sales** within State 1. State 1 is a part of the assigned territory
337 of the independent contractor even though the **sales** in State 1 are not numerous or
338 significant to the overall operation of the business. The presence of Corporation A in
339 State 1 is not *de minimis*. The presence derived from the entry of an independent
340 contractor making **sales** in State 1 arises from a conscious choice to submit to the
341 jurisdiction of State 1 because State 1 is assigned territory of the independent
342 contractor.

343 *Example 5:* Corporation A is an **out-of-state business** with respect to State 1.
344 Corporation A has a presence in State 1 derived solely from the fact that the business
345 has hired an independent contractor that is not an **in-state person** to perform on
346 behalf of the business warranty service with respect to property sold to **in-state**
347 **persons** and the independent contractor comes into State 1 on average two times per
348 year to perform the warranty service. The presence of Corporation A in State 1 is not
349 *de minimis*. The presence derived from the entry of an independent contractor to
350 perform warranty service on average two times per year in State 1 arises from a
351 conscious choice to submit to the jurisdiction of State 1. Corporation A has effected
352 an arrangement for warranty services to be performed in State 1 that is important to
353 the establishment and maintenance of the market in State 1 and reflects either a
354 **regular** and **systematic** business practice, an established company policy pursued
355 continuously, or an affirmative decision of management.

356 *Example 6:* Corporation A is an **out-of-state business** with respect to State 1.
357 Corporation A has a presence in State 1 derived solely from the fact that it owns real
358 property in State 1. The real property is not used in the business of Corporation A.
359 The presence of Corporation A in State 1 is not *de minimis*. The presence derived
360 from Corporation A’s ownership of real property located in State 1 arises from a
361 conscious choice to submit to the jurisdiction of State 1 because a corporation cannot
362 acquire ownership of real property without the affirmative decision of management.

- 363 2. *Proof of de minimis.* If an **out-of-state business** is present in the taxing
364 State, then the **out-of-state business** has the burden of establishing its
365 presence is *de minimis* by clear and cogent evidence.

- 366 E. *Duration of Nexus.* Once minimum contacts nexus or substantial nexus exists
367 under the principles of this guideline, that nexus will continue to exist without
368 any additional circumstances through the last day of the twelfth month
369 following the temporal point at which the nexus was first established.
- 370 F. *Definitions.* The following definitions apply to the terms used in this guideline,
371 including the examples. The definitions do not apply outside of the guideline.
372 Thus, the definitions do not apply to the same or similar terms used in an
373 adopting State’s statutes, or regulations, rules or other official communications
374 without an affirmative statement to that effect..
- 375 1. [Reserved.] (This paragraph is reserved for possible definition of the term
376 “business situs”.)
- 377 2. “**Common Carrier.**” The term “common carrier” means one who holds
378 itself out to the public as engaged in the business of providing
379 transportation of persons or property, including intangible property or
380 services through telecommunications, from place to place for compensation
381 on an indifferent basis.
- 382 3. “**Contract Carrier.**” The term “contract carrier” means one who is in the
383 business of providing transportation of persons or property, including
384 intangible property or services through telecommunications, from place to
385 place for compensation under exclusive agreement.
- 386 4. “**In-State Person.**” The term “in-state person” means any individual who is
387 resident in, or any entity which is organized under the laws of or
388 commercially domiciled in, this State.
- 389 5. “**Lease.**” The term “to lease” means any arrangement allowing for the use
390 of property in return for rent or other consideration.
- 391 6. “**Maintain.**” The term “maintain” means to keep in existence, continuity, or
392 operation.
- 393 *Ed. Note: Is the definition of “maintain” necessary? Not all appearances of the*
394 *term “maintain” are in bold-face, because it is believed that the definition is*
395 *not appropriate to the way the word is used in those instances.*
- 396 7. “**Occasional.**” The term “occasional” means occurring at infrequent or
397 irregular intervals in a State.
- 398 8. “**Out-of-State Business.**” The term “out-of-state business” means any
399 individual or entity conducting business that is not an **in-state person**.
- 400 9. “**Permanent.**” The term “permanent” means a duration lasting one year or
401 more or a duration of an indeterminate or indefinite length that at anytime
402 during its existence is likely to exceed one year.
- 403 10. “**Purposefully.**” The term “purposefully” means willfully accessing a
404 market in a State.
- 405 11. “**Regular.**” The term “regular” means normal or, alternatively, occurring at
406 fixed or uniform intervals in a State.

407 12. **“Representative.”** The term “representative” means any individual or entity
408 that solicits sales, conducts business, or provides services in the taxing State on
409 behalf of an **out-of-state business**. The term does not include employees. The
410 term includes, without any limitation on the foregoing, agents, corporate or
411 other business entities, related or unrelated to the **out-of-state business**, and
412 independent contractors. The term also includes sub-representatives. A
413 representative may be resident or non-resident in the taxing State.

414 13. **“Sale.”** The term “sale” means for tangible goods [*the transfer of title or*
415 *possession*] [*or insert adopting State’s concept of a sale that gives rise to*
416 *the taxable moment for imposing a sales tax on the sale of tangible goods*].
417 The term “sale” means for services or intangible goods [*the commencement*
418 *of the receipt of the service or of the delivery of the intangible property*] [*or*
419 *insert adopting State’s concept of a sale that gives rise to the taxable*
420 *moment for imposing a sales tax on the sale of services or intangible*
421 *property*].

422 *Ed. Note: Not all appearances of the term “sale” are in bold-face, because it is*
423 *believed that the definition is not appropriate to the way the word is used in*
424 *those instances. It may be preferable to use the term “taxable sale” to*
425 *differentiate when the defined term is intended.*

426 14. **“Slightest Presence.”** The term “slightest presence” means a level of
427 activity or contact that is neither (i) a **regular** and **systematic** business
428 practice; nor (ii) quantitatively or qualitatively significant to the commercial
429 interest of the business.

430 15. **“Solicitation.”** The term “solicitation” means (i) speech or conduct that
431 explicitly or implicitly invites an order for purchase or other transfer of
432 property or services; or (ii) activities that neither explicitly nor implicitly
433 invite an order for purchase or other transfer of property or services, but are
434 entirely ancillary to requests for an order.

435 *Ed. Note: Is the definition of “solicitation” needed?*

436 16. **“Systematic.”** The term “systematic” means methodically planned in
437 furtherance of the business of the **out-of-state business**.

438 17. **“Use.”** The term “use” means for tangible goods, services and intangible
439 property [*storage, use or other consumption of the object of the use tax*] [*or*
440 *insert adopting State’s concept of a use that gives rise to the taxable*
441 *moment for imposing a use tax on tangible goods, services and intangible*
442 *property*].

443 *Ed. Note: Not all appearances of the term “use” are in bold-face, because it is*
444 *believed that the definition is not appropriate to the way the word is used in*
445 *those instances. It may be preferable to use the term “taxable use” to*
446 *differentiate when the defined term is intended.*